Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1763

CHARLES SUTTON, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

CECIL HUMPHRIES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioners, Charles Sutton, Jr. and Cecil Humphries, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit in case number 77-1389, United States of America, Appellee v. Charles Sutton, Jr., Appellant, and case number

77-1390, United States of America, Appellee v. Cecil Humphries, Appellant (the cases having been tried, appealed, and decided together), which judgment affirmed an earlier judgment of the United States District Court for the Middle District of North Carolina.

OPINION BELOW

There was no opinion in the District Court. The opinion of the Court of Appeals will not be published in the official reports, and a copy thereof is appended hereto.

JURISDICTION

Jurisdiction to review the above judgment of the United States Court of Appeals, rendered May 11, 1978, is conferred by 28 U.S.C. §1254(1).

QUESTION PRESENTED

After the petitioners had declined to plead guilty to the first piece-meal indictment, which charged each with fewer offenses, unrelated to each other, and after they had obtained an order requiring one petitioner to be tried by himself on his two charges, and requiring the several charges against the other petitioner to be resolved in four different trials, and with no new evidence at all being obtained during the interim, and with no other justification being recorded therefor – did the district court and the court of appeals err in holding that due process was not violated by trying the petitioners and their co-defendant together on all twelve counts of a re-worked, new indictment based on the same identical occurrences as the first indictment?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. §1254

Courts of Appeal, Certiorari, Appeal, certified question

Cases in the Courts of Appeal may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari, granted upon the petition of any party to any civil or criminal case before or after rendition of judgment or decree..

U. S. Constitution

Amendment V – Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process; Just Compensation for Property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

The production and marketing of tobacco is controlled and regulated by federal law. Among other things, farms authorized to grow tobacco are identified by Department

of Agriculture quota cards, and when tobacco is marketed, the regulations require that it be accompanied by the quota card of the farm that it was grown on. Wilfully marketing tobacco by using a quota card issued to a farm other than the one that the tobacco was grown on has been deemed to violate § 1001, and conspiring so to do has been deemed to violate § 371, Title 18, United States Code. Neither holding is contested by this petition, which concerns only the violation of due process rights, by trying the petitioners together on a re-worked, harsher, more extensive second indictment because they had refused to plead guilty to a weaker, severable, and more easily defended first indictment.

The petitioner Humphries owned and operated the Big Yadkin Tobacco Warehouse in Yadkinville, North Carolina during the fall of 1973, and the petitioner Sutton was employed there, as was the late Herbert T. Highsmith. All three – and six others – were indicted September 7, 1976, because of various quantities of tobacco that were sold at the Big Yadkin during October and November, 1973. It was a 20-count indictment, obtained after nearly three years' investigation, that charged various of the nine defendants, in different combinations, with misusing department quota cards in marketing tobacco on eleven different occasions, and of conspiring in regard thereto on nine of those occasions. The indictment was a hodgepodge of unrelated charges; no two of the nine defendants were charged with the same offenses, and there was no joint charge at all against these petitioners, either by themselves or with others. Highsmith (who was tried with the petitioners and died while the appeal was underway) was charged with only one marketing offense and of conspiring with Sutton and others in regard thereto. The petitioner Humphries was charged only with two marketing card offenses, one acting alone, and the other in collaboration with an un-indicted accomplice. The petitioner Sutton was charged with nine distinct marketing transactions and with nine separate conspiracies in regard thereto, none of which involved Humphries, and only one of which involved Highsmith. The other six defendants, in different combinations with themselves and others, were charged with from one to six marketing offenses and conspiracies each. These latter – five tobacco farmers and the bookkeeper and office manager of the Big Yadkin (Langley) – all lived in the same part of South Carolina, and two and a half years earlier, when the investigation was begun, each farmer had admitted selling, and the bookkeeper-office manager had admitted buying, the use of the tobacco quota cards involved. Immediately after the indictment, all six indicated that they would plead guilty – and all eventually did so.

But, when arraigned October 8, 1976, the petitioners and Highsmith stood on their rights, and November 1, 1976, they obtained an order requiring that they and the various charges against them be tried on five different occasions, as follows:

That the petitioner Humphries be tried by himself on his two counts;

That Highsmith and Sutton be tried together on the only two counts that involved both of them;

That the several other charges against Sutton be resolved in three different trials..

At the same time the above order was entered, the petitioners' motions to delay the trial were denied, and the

trials were scheduled for the December, 1976 term, though the beginning date was not fixed at that time, because the Assistant United States Attorney handling the cases was then engaged in a trial of uncertain duration. But none of the five trials on the first indictment were held. December 6, 1976, without notice to the petitioners or the judge, while the petitioners were standing by, ready for trial, without any new evidence being obtained, and with no other justification therefor being recorded a second indictment, based on identically the same events, was returned against them and Highsmith. This indictment charged each of them with committing all eleven marketing offenses – (whereas, the first indictment charged Humphries with being involved in but two of them, and Highsmith with but one) – and of participating in one master conspiracy in regard thereto. When tried, several weeks later, though the petitioners and Highsmith denied committing any of the offenses, and though none of the farmers that sold the use of their quota cards had ever seen or heard tell of the petitioners and Highsmith, and though there was testimony about Highsmith participating in only one of the eleven transactions, and about Humphries participating in another, with the evidence that tended to involve each of the tri-defendants being received against all, all were convicted. And upon appeal, the judgment of the district court was affirmed by a per curiam opinion that analyzed neither the record nor the legal principles that apply to it.

BASIS OF FEDERAL JURISDICTION

Federal jurisdiction in the court of first instance is based upon the fact that the defendants were charged with violating the provisions of §1001 and §371 of Title 18, United States Code.

REASONS FOR GRANTING THE WRIT

In the opinion below, the court of appeals misapplied this Court's ruling in *Bordenkircher v. Hayes,* ___ U.S. ___ (January 18, 1978), thereby beclouding "a constitutional question of importance in the administration of justice," because of which, this writ should be granted.. The differences between that case and this are both distinct and decisive. In *Bordenkircher,* the record showed that during plea bargaining on the indictment initially issued, the defendant was warned that if he did not plead guilty, that an additional indictment would be issued, charging him with being an habitual felon, which his record clearly warranted. And after he was so indicted and convicted, this Court said:

> "This is not a situation, therefore, where the prosecutor without notice brought an additional and more serious charge after plea negotiations relating only to the original indictment had ended with the defendant's insistence on pleading not guilty."

But in this case: no charge was left out of the first indictment, which covered the same identical transactions and occurrences as the second indictment; and no additional charges were either threatened, mentioned, or considered during plea bargaining on the first indictment. And the petitioners and their counsel, who were engaged and were preparing for an altogether different trial, were surprised when the indictment was suddenly re-issued, so as to enable the petitioners and their co-defendant to be tried together on the re-worked charges.

Since *Blackledge v. Perry,* 417 U.S. 21 (1974), and its progenitor, *North Carolina v. Pearce,* 395 U.S. 711 (1969),

the commendable policy of protecting defendants from even the appearance of retaliatory prosecution has been applied in several cases whose facts were weaker than those in this case, including the following:

> *United States v. Jamison*, 505 F.2d 407 (D.C. Cir. 1974), where defendant was re-indicted for first degree murder, after successfully moving for a mistrial in a prosecution for second degree murder.
>
> *United States v. Ruesqa-Martinez*, 534 F.2d 1367 (9th Cir. 1976), where defendant, first arraigned on a single count misdemeanor, was re-indicted on a multiple count felony after refusing to waive jury trial.
>
> *United States v. DeMarco*, 401 F. Supp 505 (C.D. Cal. 1975), where Nixon aide was indicted for an additional substantive offense, after successfully obtaining a change of venue and refusing to stand trial jointly with co-defendant under prior conspiracy and 18 U.S.C. § 1001 counts.
>
> *United States v. Gerard*, 491 F.2d 1300 (9th Cir. 1974), where defendant, after withdrawing his guilty plea, was indicted on new firearms count that was associated with the offense initially charged.

Blackledge, of course, placed no *aboslute* bar to the bringing of more or heavier charges after a defendant has invoked rights under a prior indictment. But where it is obvious that things might have been made tougher for a defendant just because he stood on his rights, it did *put the burden on the prosecution to show that that was not the case.* As the court there indicated, and as *Bordenkircher* shows, this burden be met by showing "intervening events" and other

justifying circumstances. But no such "intervening events" or other justifying circumstances occurred or existed here. The government here had petitioners under investigation for three years before bringing the first indictment. The dates, places, pounds, card numbers, card owners, and other details of the eleven marketing transactions alleged in the second indictment were identical to those in the first, and no new evidence was obtained relating the petitioners to any of them or to the conspiracy alleged with respect thereto. According to the government's files, examined during discovery, all the evidence presented at the trial was unearthed long before the first indictment was brought, and no new evidence at all was unearthed thereafter. How the court of appeals formed the impression that "the record shows that the evidence to justify a prosecution of new charges in the second indictment was not uncovered until after the first indictment was returned," is not known. There is nothing at all in the record to warrant that declaration.

Also in ruling that prosecutorial vindictiveness was disproved by the prosecutor's willingness to continue until the last to accept a plea to a single count of the original indictment, the court of appeals misperceived the usual thrust and purpose of prosecutorial vindictiveness, and the thrust and purpose in this instance. Prosecutors are judged by their conviction rate, not by the sentences imposed, and nearly all prosecutorial overreaching comes about from trying to assure a conviction or a guilty plea in the first place, the punishment received being of little or no concern to most prosecutors. And re-working an indictment simply "to create a stronger case for the government," after a defendant has stood on his rights, is simply the other side of the prosecutorial vindictiveness coin. *United States v. Johnson*, 537 F.2d 1170 (4th Cir. 1976).

CONCLUSION

The decision below conflicts with decisions of this Court. And the writ should be granted – both to prevent these petitioners from being deprived of their due process rights, and also to enable the Court to clarify the restrictions under which an indictment can be re-worked to a defendant's detriment, after he has stood on his rights.

Respectfully submitted,

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APPENDIX

OPINION BELOW

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 77-1389

United States of America,

Appellee,

v.

Charles Sutton, Jr.,

Appellant.

No. 77-1390

United States of America,

Appellee,

v.

Cecil Humphries,

Appellant.

Appeals from the United States District Court for the Middle District of North Carolina, at Winston Salem. Eugene A. Gordon, Chief Judge.

Argued April 7, 1978 Decided May 11, 1978

Before WINTER, RUSSELL and HALL, Circuit Judges.

Eugene H. Phillips (Richard N. Weintraub on brief) for Appellants; Benjamin H. White, Jr., Assistant United States Attorney (H. M. Michaux, Jr., United States Attorney, on brief) for Appellee.

PER CURIAM:

We see no error in the multiple convictions of Charles Sutton, Jr., and Cecil Humphries for willfully marketing tobacco improperly using quota cards, in violation of 18 U.S.C. §1001, and the single conviction for conspiracy in regard thereto, in violation of 18 U.S.C. § 371.

On appeal, their principal contention is that they were denied due process of law and were the victims of prosecutorial misconduct when they were tried and convicted on a superseding indictment charging multiple violations of § 1001 after they declined to plead guilty to one count of the original indictment charging fewer violations of § 1001. The contention is lacking in merit for two reasons. First, the record shows that the evidence to justify a prosecution of the new charges in the second indictment was not uncovered until after the first indictment was returned. There was thus reason for the second indictment aside from prosecutorial vindictiveness. Second, the government's offer to accept a plea to a single count of the original indictment was renewed and kept open to the date of trial on the superseding indictment. The case is thus governed by Bordenkircher v. Hayes, ___ U.S. ___ (January 18, 1978).

We see no merit in defendants' argument in regard to the district court's refusal to give their requested partnership instruction.

AFFIRMED.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

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UNITED STATES OF AMERICA

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that a superseding indictment filed against them prior to trial was the product of prosecutorial vindictiveness and deprived them of due process.

Following a jury trial in the United States District Court for the Middle District of North Carolina, petitioners were each convicted of conspiracy to falsify material facts concerning the source of mar-

keted tobacco, a matter within the jurisdiction of the United States Department of Agriculture, in violation of 18 U.S.C. 371. In addition, petitioner Sutton was convicted on ten counts, and petitioner Humphries on six counts, of falsifying material facts, in violation of 18 U.S.C. 1001. Petitioner Sutton was sentenced to concurrent terms of 21 months' imprisonment, and petitioner Humphries was sentenced to concurrent terms of 18 months' imprisonment.[1] The court of appeals affirmed *per curiam* (Pet. App. 1a-2a).

In brief, the evidence at trial showed that in October and November 1973 petitioners engaged in a scheme to market over 25,000 pounds of tobacco the source of which was falsely identified by use of Department of Agriculture quota cards that had been issued to farmers to designate tobacco grown on the property of those farmers. Most of the tobacco was marketed at the Big Yadkin Warehouse in North Carolina, owned and operated by petitioner Humphries and managed by petitioner Sutton.

The original indictment was filed on September 7, 1976 (C.A. App. a1-a14). It named petitioners and seven others as defendants. Petitioner Sutton was charged with nine substantive offenses and with nine separate conspiracies; each conspiracy charged an agreement to commit one of the substantive offenses.

[1] Co-defendant Herbert T. Highsmith was tried together with petitioners and was also convicted of conspiracy, in violation of 18 U.S.C. 371, and of falsifying material facts, in violation of 18 U.S.C. 1001 (C.A. App. a49-a50) ("C.A. App." refers to the joint appendix in the court of appeals). Highsmith died while the case was pending on appeal.

Petitioner Humphries was charged with two substantive offenses (*ibid.*).

At their arraignment on October 8, 1976, both petitioners pleaded not guilty. Thereafter, they moved pursuant to Rule 14, Fed. R. Crim. P., for separate trials for each defendant and for separate trials for certain of the counts contained in the indictment against each defendant. The district court granted the motion, ruling that petitioners' cases should be severed for trial and that petitioner Sutton should be given four separate trials on the various counts of the indictment (C.A. App. a15-a16). The prosecutor, who had not been personally involved in drafting the original indictment, indicated that he expected six of petitioners' co-defendants to plead guilty and that the government might subsequently elect to go to trial on only some of the counts in order "to make things somewhat simpler for all parties involved" (*id.* at a15-a17).

On November 8 and 9, 1976, the remaining co-defendants pleaded guilty (Gov't. Br. 4). Thereafter, on December 6, 1976, a superseding indictment was filed, charging petitioners jointly with one count of conspiracy and with eleven substantive violations (C.A. App. a19-a32).[2] The government, which had

[2] The second indictment differed in certain respects from the original. Petitioners and co-defendant Highsmith were joined as defendants in each count of the superseding indictment; in the first indictment, on the other hand, all of the defendants, including those who later pleaded guilty, were variously charged in different combinations. Moreover, the conspiracy alleged in the superseding indictment was sub-

previously offered to accept petitioner's guilty plea to one count of the first indictment, kept its offer open until the commencement of trial (Gov't. Br. 29).

Petitioners contend (Pet. 5-9) that the government's action in filing a superseding indictment—after petitioners had pleaded not guilty and had successfully moved for a severance—created "a realistic likelihood of [prosecutorial] 'vindictiveness'" (*Blackledge* v. *Perry*, 417 U.S. 21, 27) that deprived petitioners of due process.[a] Assuming that *Blackledge* has relevance in a case such as this where the superseding indictment served to clarify the charges in the original indictment without altering the basic nature of those charges, the circumstances of this case negate any inference of government vindictiveness, as the court below properly found (Pet. App. 2a).

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stantially different from any offense charged in the initial indictment (compare the conspiracy counts of the first indictment with count one of the second indictment [C.A. App. a19-a24]). The substantive counts in the superseding indictment relate to the same events charged in the first indictment, but count eight, which replaced former count twelve, corrected a defective allegation concerning the manner in which the tobacco was falsely identified on one particular occasion.

[a] Petitioners failed to move for dismissal of the superseding indictment on this theory in the district court. We submit that they are precluded from raising this issue in this Court as a consequence of their failure to raise it in timely fashion in the district court. See Rule 12(f), Fed. R. Crim. P. Because of this failure by petitioners, the government was prevented from making a factual record in the district court that would disprove the theory of "vindictiveness" with greater clarity. Accordingly, we rely in part upon the representations contained in the government's brief in the court of appeals. See *United States* v. *Lovasco*, 431 U.S. 783, 786-787.

Here, unlike *Blackledge*, after the original indictment had been obtained the government discovered new evidence that showed that petitioner Humphries and co-defendant Highsmith were more deeply involved in certain aspects of the criminal scheme than originally believed. This new evidence consisted primarily of the testimony of the co-defendants who had pleaded guilty (Gov't. Br. 28-29). Furthermore, an additional witness, Carl Thomas Brock, also indicated a willingness to testify against petitioners in support of the new allegations contained in the superseding indictment (Gov't. Br. 29). This new evidence—not prosecutorial vindictiveness—prompted the superseding indictment.

Moreover, the prosecutor who obtained the superseding indictment had not been responsible for the drafting of the original indictment. His review of the file in this case convinced him that one of the substantive counts had been incorrectly drafted and that the nine separate conspiracy counts alleged different aspects of a single, unified conspiracy. The superseding indictment was thus warranted to correct a plain error in the original indictment and to clarify the conspiracy charge (Gov't. Br. 28).

It is also significant that the superseding indictment did not charge any new or more serious crimes than had originally been alleged. Indeed, while petitioners were charged with additional substantive counts in the superseding indictment and petitioner Humphries was charged, for the first time, with conspiracy, the government dropped eight conspiracy counts against

petitioner Sutton. That the government *reduced* the number of charges against one of the petitioners confirms that it was not seeking to punish petitioners for having asserted their rights.

The conclusion that the government did not secure the superseding indictment for retaliatory purposes is buttressed by the fact that the government did not object to petitioners' motion for severance of the original charges, and in fact conceded that those charges had to be severed, at least to some extent, for trial (C.A. App. a15). Moreover, as the court of appeals pointed out (Pet. App. 2a), "the government's offer to accept a plea to a single count of the original indictment was renewed and kept open to the date of trial on the superseding indictment." Thus, because the government did not oppose petitioners' assertion of their rights and held open its original plea offer, it is not plausible to contend that the second indictment was the product of vindictiveness. See *United States* v. *Thurnhuber*, 572 F.2d 1307, 1310-1311 (C.A. 9).

Blackledge, *supra*, is inapposite on these facts. The Court there held that due process was denied when the state responded to the defendant's assertion of his right to a trial *de novo* by filing more serious charges, since a defendant is entitled to exercise his procedural rights without fear of prosecutorial vindictiveness. In this case, however, the prosecutor's action in bringing the superseding indictment was unrelated to the exercise of petitioners' procedural rights, and, accordingly, there is no "danger that the

[government] might [have] be[en] retaliating against the accused."[4] *Bordenkircher* v. *Hayes*, No. 76-1334, decided January 18, 1978, slip op. 6. See *Blackledge* v. *Perry*, *supra*, 417 U.S. at 29 n. 7; *United States* v. *Nell*, 570 F.2d 1251, 1254-1255 (C.A. 5); *United States* v. *Ricard*, 563 F.2d 45, 46-48 (C.A. 2), certiorari denied, No. 77-5852, March 6, 1978; *United States* v. *Partyka*, 561 F.2d 118, 124 (C.A. 8), certiorari denied, No. 77-5461, January 16, 1978.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

AUGUST 1978.

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[4] Although prosecutorial vindictiveness may present a realistic danger in cases where a defendant successfully appeals a conviction or demands a second trial *de novo*, a routine motion to sever charges of the kind here involved does not present a comparable danger of retaliatory action.

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